Supreme Court, U.S.
FILED

05-772 OCT 11 2005

OFFICE OF THE CLERK

CASE NUMBER _____

UNITED STATES SUPREME COURT

DONALD J. SCHUTZ.

Appellant

v.

THE STATE OF WYOMING AND
TOM THORNE, IN HIS OFFICIAL
CAPACITY AS ACTING DIRECTOR
OF THE WYOMING GAME AND FISH COMMISSION,
ET AL., ETC.,

Appellees.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Donald J. Schutz
535 Central Avenue
St. Petersburg, Florida 33701
727-823-3222

BEST AVAILABLE COPY

(a) Question Presented for Review

Do the traditional limits on judicial inquiries into the rational basis of state legislation under the Equal Protection Clause of the Fourteenth Amendment apply to non-resident challenges to state non-resident hunting laws creating disparate treatment of non-residents since a non-resident has no power at the polls of the state that is passing the laws affecting the non-resident?

(b) List of All Parties

Plaintiff: Donald J. Schutz, a resident of the State of Florida.

Defendants: The Game and Fish Commission of the State of Wyoming, consisting of

Tom Thorne
J. Michael Powers
Linda Fleming
Doyle Dorner
Jerry Sanders
Gary Lundvall
Kerry Powers
M. Hale Kreycik

(c) Table of Contents and Table of Cited Authorities

(a) Question Presented for Review 1

(b) List of All Parties 2

(c) Table of Contents and Table of Cited Authorities 3

(d) Citations of the Official and Unofficial Reports of the Opinions and Orders Entered 5

(e) Statement of the Basis for Jurisdiction in this Court 6

(f) The Constitutional Provisions, Treaties, Statutes, and Ordinances Involved in the Case (Full Text At Appendix) 7

(g) Statement of the Case 8

(h) Argument 9

(i) Appendix 14

1.*Schutz v. Thorne,* 415 F.3d 1128 (10th Cir., 2005) 15

2. Orders of the United States District Court of Wyoming
- (i) January 21, 2003 33
- (ii) March 13, 2003 34
- (iii) May 28, 2003 Final Order 35

3.Equal Protection Clause of the Fourteenth 53

4. Wyoming Statute W.S. 23-2-401 54

5. Wyoming Statute W.S. 23-1-703 55

6. Wyoming Statute W.S. 23-2-101 58

Cited Authorities

FCC v. Beach Communications
508 U.S. 307 (1993) 10

Williamson v. Lee Optical of Oklahoma, Inc.
348 U.S. 483 (1955) 11

McCready v. Virginia, 94 U.S. 391 (1877) 12

(d) Citations of the Official and Unofficial Reports of the Opinions and Orders Entered

Schutz v. Thorne, 415 F.3d 1128 (10th Cir., 2005)

Schutz v. State of Wyoming and Tom Thorne, Etc., Et al., 2003 U.S. Dist. Lexis 26518, Case No. 02-CV-165-D, United States District Court for the District of Wyoming (May 28, 2003).

(e) Statement of the Basis for Jurisdiction in this Court.

This Writ of Certiorari lies from a final order of the United States Court of Appeals for the Tenth Circuit affirming a final order of the United States District Court for the State of Wyoming. This Court has jurisdiction for permissive certiorari review pursuant to 28 U.S.C. δ1254 (1).

(f) The Constitutional Provisions, Treaties, Statutes and Ordinances Involved in the Case (Full Text at Appendix)

Equal Protection Clause of the Fourteenth Amendment to the United States Constitution
Wyoming Statute W.S. 23-2-401 (the Guide Statute)
Wyoming Statute W.S. 23-1-703 (the Quota Statute)
Wyoming Statute W.S. 23.2-101 (the Fee Statute)

(g) Statement of the Case

Statement of basis for federal jurisdiction in the court of first instance. This case originally was filed by Schutz against the State of Wyoming Game and Fish Commission, naming the commissioners in their official capacity, in the United States District Court for the District of Wyoming under Federal Question jurisdiction, 28 U.S.C. 1331.

Statement of the Case.

September 12, 2002, Schutz filed Complaint pursuant to 42 U.S.C. 1983 and 28 U.S.C. 2201 against the Wyoming Game and Fish Commission through the Director and other members in their official capacity seeking a declaratory judgment that the Guide Statute, Quota Statute, and Fee Statute violate the United States Constitution.

January 21, 2003, United States District Court entered an order treating the Defendants' Motion to Dismiss as a Motion for Summary Judgment and directing supplemental filings and briefings.

February 27, 2003, Schutz filed Motion for Partial Summary Judgment seeking summary judgment that the Guide Statute was facially unconstitutional.

May 28, 2003, United States District Court entered an Order providing, as it relates to this Petition (1) Schutz has no standing to challenge the Guide Statute (2) Schutz has standing to challenge the Fee Statute and the Quota Statute (3) the correct Standard of Review is "rational basis" and (4) all three statutes are rationally related to a legitimate state interest.

June 24, 2003, Schutz filed Notice of appeal to the United States Court of Appeals for the Tenth Circuit.

July 11, 2005, the United States Court of Appeals affirmed the United States District Court in *Schutz v. Thorne*, 415 F.3d 1528 (10th Cir., 2005).

October 11, 2005, Schutz filed this timely Petition for Writ of Certiorari seeking a review of the July 11, 2005 order of the United States Court of Appeals for the Tenth Circuit.

(h) Argument

Non-residents have no power at the polls, and therefore, except through judicial challenges, non-residents have no power to modify or challenge the enactment and enforcement of irrational state laws that discriminate against non-residents. The application of the traditional maxim that courts will not evaluate the reasoning of legislatures when conducting equal protection reviews based on the rational basis test is premised on the fundamental notion that aggrieved parties have a solution at the polls. When dealing with non-residents and state statutes affecting non-residents, the application of this traditional judicial maxim leaves aggrieved non-residents with no remedy for constitutional injuries. Schutz, a non-resident, was denied a trial on his claims that Wyoming hunting statutes unfairly and illegally discriminate against non-resident hunters. His claims were adjudicated by the District Court on summary judgment. Schutz contends, and contended to the United States Court of Appeals, that he is entitled to a trial. The Court of Appeals rejected his argument, relying on a line of cases that effectively hold that courts may not analyze legislative errors and that the remedy for such legislation is a political solution at the polls. However, Schutz contends that as a non-resident, he has no such solution. The traditional judicial restraint in conducting fact-finding relating to the rational basis of state statutes should not apply when the aggrieved party is a non-resident and has no power at the polls.

Schutz, a non-resident of the State of Wyoming, challenged three Wyoming statutes governing non-resident hunting in Wyoming: (1) the "fee statute" creating a substantially higher monetary amount that a non-resident

pays for a hunting license (2) the "quota statute" that allocates hunting licenses in a way that dramatically limits the ability of non-residents to hunt certain big-game species such as big horn sheep and (3) the guide statute, that requires non-residents to use licensed guides in federal wilderness areas. Schutz was found to have standing to challenge the fee statute and the quota statute, but was found to have no standing to challenge the guide statute.

The only issue that Schutz seeks this Court to review is whether the traditional limits on the judicial review of the rational basis for legislative action applies to non-resident actions challenging state laws affecting non-residents. The Court of Appeals rejected Schutz' challenge relying on *FCC v. Beach Communications,* 508 U.S. 307 (1993) and similar cases. These cases generally stand for the proposition that, " . . . a legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data," *Id.,* at 315. Schutz contends that the non-resident hunting requirements are factually unrelated to a rational state interest, and the district court's disposition of his claims on summary judgment was therefore improper. As stated in the opinion of the Court of Appeals, "According to Schutz, the district court erred in dismissing his claim at the summary judgment stage because, in his view, "the analysis of the reasonable relationship of the regulation to the means is a factual question, not a legal issue." Aplt.Op.Br. at 21. Schutz is mistaken," citing *FCC v. Beach Communications,* 508 U.S. 307 (1993) and similar authority.

A reading of the opinion of *FCC v. Beach Communications,* 508 U.S. 307 (1993), seems to indicate that the courts have effectively banned any judicial inquiry into the legitimacy of any legislative reasons, no matter how speculative, to justify a disparate law under a rational basis equal protection review. In this opinion, this Court states, " . . . equal protection is not a license for courts to judge the wisdom, fairness, or logic of legislative choices," *Id.,* at 313.

While at first blush this may seem dispositive of the issue, because Schutz insists that he is entitled to a judicial inquiry into the speculative reasoning utilized to uphold a rational basis to seemingly irrational non-resident hunting statutes, the following important paragraph in this opinion was not considered by the Court of Appeals in applying this maxim to the claims of the non-resident Schutz:

"The Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted." *Id,* at 313, citing *Vance* v. *Bradley*, 440 U.S. 93, 97, 59 L. Ed. 2d 171, 99 S. Ct. 939 (1979).

Looking further, this long history of judicial respect for the legislative process is based on the fundamental notion that the electorate can right any irrational wrong of a legislature by acting at the polls. In the 1955 case of *Williamson v. Lee Optical of Oklahoma, Inc.,* 348 U.S. 483 (1955), which upheld an Oklahoma law under both the Due Process Clause of the Fourteenth Amendment and the Equal Protection Clause, this Court stated, "(f)or protection against abuses by legislatures the people must resort to the polls, not to the courts." *Id.,* at 488.

None of the cases relied upon by the Court of Appeals in denying Schutz a trial on his claims involved a case where the aggrieved party had no power at the polls. Schutz contended to the Court of Appeals that he was entitled to a trial, and the Court of Appeals affirmed summary judgment against Schutz on the theory that legislation will not be subjected to judicial factfinding upon an equal protection challenge relying on cases emanating from the political power of the electorate to modify offending legislation through the power of the polls. Where Schutz, the aggrieved

party, has no power of the polls, this maxim is inapplicable and the Court of Appeals erred in applying this doctrine. For this reason, the judgment of the Court must be reversed.

Wyoming statutes are passed by Wyoming legislators who are elected by Wyoming citizens, including Wyoming hunters. Non-residents, including Schutz, are obviously not allowed to participate in those political choices made by the state electorate in selecting state legislators, or in the laws subsequently enacted by these legislators even though the laws directly affect their rights to travel within and enjoy the National Parks under the federal park system, federal lands within state boundaries, private lands including private lands owned by the non-residents, and state lands.

States have long been recognized to be in control of wildlife within their geographic boundaries, *McCready v. Va.*, 94 U.S. 391 (U.S. 1877), and are thereby empowered to regulate hunting within the boundaries of the states, including hunting in federal parks, national forests, private lands, and state lands lying within the state. Thus, in a state like Wyoming that is comprised of thousands of acres of federal parks, lands, and forests, the states are in a unique position to pass disparate legislation to grant its citizens a greater power to utilize these federal resources than are allowed to the citizens of the rest of the nation. No Wyoming legislator could reasonably be heard to say to the states' voters, "let's lower the price of the non-resident licenses and raise your license fees," or "let's give the Florida hunters more big horn sheep licenses and make it more difficult for a Wyoming resident to obtain one."

Non-residents have no power at the polls. Nonresidents have no voice, and there is no reason for anyone to promote the interests of non-resident hunters raised by Schutz. Because of this, nonresidents pay $1500.00 for a big horn sheep license that is drawn through the Quota Statute creating infinitesimal odds of obtaining permits, while residents pay $75.00 and draw in quotas with dramatically

greater odds. When nonresidents challenge these arbitrary and irrational statutes in courts, they are told that the courts will not evaluate the statutes and the remedy is at the polls. Non-residents cannot go to the polls. Nonresidents are faced with a constitutional wrong without a remedy, a judicial maxim imposed on nonresidents based on the improper assumption that they have some ability to remedy it at the polls.

Schutz contended to the Court of Appeals that he was entitled to a trial due to the fact that his affidavits filed with the District Court raised material issues of fact and he was therefore entitled to a judicial inquiry on his equal protection claims. The District Court granted summary judgment to the State, and the Court of Appeals affirmed summary judgment against Schutz on the theory that state legislation will not be subjected to judicial factfinding upon an equal protection challenge, erroneously relying on cases emanating from the political power of the electorate to modify offending legislation through the power of the polls. Where Schutz, the aggrieved party, has no power of the polls, this judicial tenet is inapplicable and the Court of Appeals must be reversed.

Wherefore; Donald J. Schutz requests this Court to grant this Petition for Writ of Certiorari, to grant Certiorari review, and to accept this case for briefing and resolution on the merits.

Respectfully submitted,

Donald J. Schutz
535 Central Avenue
St. Petersburg, Florida 33701
727-823-3222

(i) Appendix

1. *Schutz v. Thorne*, 415 F.3d 1128 (10th Cir., 2005).
2. Orders of United States District Court of Wyoming:
    (i) Order Dated January 22, 2003
    (ii) Order Dated March 13, 2003
    (iii) Order Dated May 28, 2003
3. Equal Protection Clause of the Fourteenth Amendment
4. Wyoming Statute W.S. 23-2-401 (the Guide Statute)
5. Wyoming Statute W.S. 23-1-703 (the Quota Statute)
6. Wyoming Statute W.S. 23.3-302 (the Fee Statute)

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

DONALD J. SCHUTZ, Plaintiff-Appellant,
v.
TOM THORNE, Wyoming Game & Fish Director, in his official capacity; STATE OF WYOMING; J. MICHAEL POWERS, Wyoming Game & Fish Commissioner, for District #1, in his official capacity; LINDA FLEMING, Wyoming Game & Fish Commissioner, for District # 2, in her official capacity; DOYLE DORNER, Wyoming Game & Fish commissioner, for District # 3, in his official capacity as commission vice president; JERRY SANDERS, Wyoming Game & Fish Commissioner, for District # 4, in his official capacity; GARY LUNDVALL, Wyoming Game & Fish Commissioner, for District # 5, in his official capacity as commission president; KERRY POWERS, Wyoming Game & Fish Commissioner, for District # 6, in his official capacity; M. HALE KREYCIK, Wyoming Game & Fish Commissioner, for District # 7 , in his official capacity, Defendants-Appellees. U.S. OUTFITTERS, INC., JEAN TAULMAN, LAWRENCE MONTOYA, FILIBERTO VALERIO, INTERNATIONAL ASSOCIATION OF FISH AND WILDLIFE AGENCIES, Amici Curiae.

No. 03-8051

July 11, 2005, Filed

PRIOR HISTORY: [**1] APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WYOMING. (D.C.

NO. 02-CV-165-D). *Schutz v. Wyoming, 2003 U.S. Dist. LEXIS 26518 (D. Wyo., May 28, 2003)*

COUNSEL: Donald J. Schutz, Saint Petersburg, Florida, for Plaintiff-Appellant.

Jay A. Jerde, Senior Assistant Attorney General (with Patrick J. Crank, Attorney General, and Jennifer A. Golden, Deputy Attorney General, on the brief), Office of the Wyoming Attorney General, Cheyenne, Wyoming, for Defendants-Appellees.

James R. Scarantino, Albuquerque, New Mexico for Amici Curiae U.S. Outfitters, Inc., Jean Taulman, Lawrence Montoya, and Filiberto Valerio.

Paul A. Lenzini filed an amicus brief for International Association of Fish and Wildlife Agencies.

JUDGES: Before TYMKOVICH, McWILLIAMS, and PORFILIO, Circuit Judges.

OPINION BY: TYMKOVICH

OPINION: [*1130] TYMKOVICH, Circuit Judge.

The question in this case is whether three Wyoming statutes unconstitutionally limit equal access to hunting opportunities for nonresidents. Donald Schutz, a Florida resident, brings this *42 U.S.C. § 1983* suit against the state of Wyoming and various state officials representing the game and fish commission (together "Wyoming") for allegedly violating his constitutional rights. Relying on the *Equal Protection* [**2] *Clause of the Fourteenth Amendment* and the so-called "dormant" Commerce Clause of Article I,

Section 8, of the United States Constitution, he claims that *sections 23-2-101* (the "Fee Statute"), *23-1-703* (the "Quota Statute"), and *23-2-401* (the "Guide Statute") of the Wyoming code impermissibly burden nonresident hunters.

The district court granted summary judgment in favor of the Defendants, and Schutz filed a timely appeal. Exercising jurisdiction under *28 U.S.C. § 1291*, we affirm the district court's holdings regarding Schutz's standing to challenge the statutes. [*1131] As to the merits, (a) we affirm the district court's dismissal of the statutory challenges on equal protection grounds, and (b) regarding the dormant *Commerce Clause* claim, we find that it is moot in light of Section 6063 of House Bill 1268, approved by the United States Congress and signed into law on May 10, 2005.

I. Background

A. Factual and Procedural History

Schutz resided in Wyoming from 1954 until his graduation from the University of Wyoming in 1975. During that time, Schutz traveled the state extensively, hunting species of big game. After moving out-of-state, he often returned [**3] during the various hunting seasons. Schutz is not alone in finding Wyoming an enticing place to hunt big game. According to amicus U.S. Outfitters, Inc., nonresident hunters in 2001 spent approximately $ 123 million in Wyoming. Schutz himself claims that Wyoming receives $ 38.9 million in direct revenue from hunters and fishermen, three-quarters of which comes from nonresidents. App. tab 5 at 10.

Wyoming has responded to the interest in these sports by crafting a variety of regulatory provisions. Three such statutory provisions led Schutz to file the present claim. As discussed in detail below, the first is a Fee Statute, which charges higher fees to out-of-state hunters compared to in-state hunters. The second is a Quota Statute, which reserves a greater number of licenses for residents. Finally, Wyoming adopted a Guide Statute, requiring out-of-state hunters to

employ either a professional or resident guide to hunt in designated wilderness areas.

In 2002, Schutz purchased a nonresident elk license, and used it to hunt on non-wilderness lands. Some months later, Schutz applied for a 2003 license to hunt bighorn sheep but decided against applying for elk or deer licenses because [**4] the licenses were too expensive, and he was unwilling to hire a professional guide or find a resident guide. The record does not disclose whether he in fact drew a bighorn sheep license.

Schutz then filed suit challenging the constitutionality of these three provisions of the Wyoming code. Wyoming responded by moving to dismiss, and again moved to dismiss after Schutz filed an amended complaint. The district court converted Wyoming's motion to a motion for summary judgment and allowed both parties to supplement the record. Schutz also filed a cross motion for summary judgment. Finding that Schutz did not have standing to challenge the Guide Statute and that the Quota and Fee Statutes did not violate his constitutional rights, the court granted summary judgment for Wyoming.

B. Wyoming's Hunting Statutes

Schutz claims that three hunting statutes, individually and in concert, unconstitutionally limit his ability to legally hunt big game in the state of Wyoming. The statutes create special preferences for Wyoming residents in three ways: (1) in-state hunting licenses are cheaper, (2) more licenses are allocated to residents, and (3) residents are exempt from a requirement that [**5] hunters in wilderness areas obtain a guide.

1. The Fee Statute

The Fee Statute assesses much higher hunting license fees on out-of-state residents:

(xiii) Resident deer license; one deer	$ 25.00
(xiv) Nonresident deer license; one deer	$ 210.00

. . .

(xvii) Resident elk license; one elk	$ 35.00
(xviii) Nonresident elk license; one elk	$ 400.00
. . .	
(xxi) Resident bighorn sheep license; one bighorn sheep	$ 75.00
(xxii) Nonresident bighorn sheep license; one bighorn sheep	$ 1500.00

Wyo. Stat. Ann. § 23-2-101 (2002).

The fee difference is applicable to every species of big and trophy game, including, among others, deer, elk, mountain lion, grizzly bear, and antelope. The fee structure also includes a reduced rate for resident and nonresident youth.

2. The Quota Statute

The Quota Statute reserves to Wyoming residents a majority of the available licenses for exotic game such as bighorn sheep, mountain goats, moose, and grizzly bear:

The commission shall reserve eighty percent (80%) of the moose and seventy-five percent (75%) of the bighorn sheep, mountain goat and grizzly bear licenses to [**6] be issued in any one (1) year for resident hunters.

Wyo. Stat. Ann. § 23-1-703(e) (2002).

A smaller percentage of deer and elk licenses are reserved to Wyoming residents.

3. The Guide Statute

The Guide Statute creates two classes of hunters--resident and nonresident--for wilderness hunting:

(a) No nonresident shall hunt big or trophy game animals on any designated wilderness area, as defined by federal or state law, in this state unless accompanied by a licensed professional guide or resident guide. . . .

(b) Any resident possessing a valid resident big or trophy game animal license may apply for and receive a resident guide license. . . .

Wyo. Stat. Ann. § 23-2-401 (2002).

II. Analysis

A. Standard of Review

We review *de novo* questions of subject matter jurisdiction, including whether a plaintiff has standing to sue. *Wilson v. Glenwood Intermountain Props., 98 F.3d 590, 593 (10th Cir. 1996)*. We also review *de novo* the grant of a motion for summary judgment. *Garrett v. Hewlett-Packard Co., 305 F.3d 1210, 1216 (10th Cir. 2002)*.

Summary [**7] judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Fed. R. Civ. P. 56(c)*. "A disputed fact is 'material' if it might affect the outcome of the suit under the governing law, and the dispute is 'genuine' if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Allen v. Muskogee, 119 F.3d 837, 839 (10th Cir. 1997)*. "When applying this standard, we view the evidence and draw reasonable inferences therefrom in the light most favorable to the nonmoving party." *Simms v. Oklahoma ex rel. Dep't of Mental Health & Substance Abuse Servs., 165 F.3d 1321, 1326 (10th Cir. 1999)*. The nonmoving party must

nonetheless present "facts such that a reasonable jury could find in [his] favor." *Id.*

B. Standing

Standing analysis, as the district court recognized, is as important as it is fact-sensitive. The doctrine is especially significant when federal courts [**8] sit in judgment [*1133] over duly enacted state laws, given our concern about "the proper--and properly limited--role of the courts in a democratic society." *Allen v. Wright, 468 U.S. 737, 750, 82 L. Ed. 2d 556, 104 S. Ct. 3315 (1984)*; *E. Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 124 S. Ct. 2301, 2308, 159 L. Ed. 2d 98 (2004)*. Whether a plaintiff has standing to sue "turns on the precise allegations of the parties seeking relief" and must be supported by specific facts. *Wyoming ex rel. Sullivan v. Lujan, 969 F.2d 877, 882 (10th Cir. 1992)* (quoting *National Wildlife Fed'n v. Hodel, 268 U.S. App. D.C. 15, 839 F.2d 694, 703-04 (D.C. Cir. 1988))*. As a result, standing analysis is often as confusing as it is fundamental. *See Schaffer v. Clinton, 240 F.3d 878, 882 n.5 (10th Cir. 2001)* (citing *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 475, 70 L. Ed. 2d 700, 102 S. Ct. 752 (1982))*; 13 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 3531 (2d ed. 1984)). The three constitutional elements of standing are nonetheless [**9] well established:

> First, the plaintiff must have suffered an "injury in fact" - an invasion of a legally protected interest that is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of . . . . Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. *Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61, 119 L. Ed. 2d 351, 112 S. Ct. 2130 (1992)*; *Nova*

Health Sys. v. Gandy, 388 F.3d 744, 749-51 (10th Cir. 2004).

These three elements--injury, causation, and redressibility--must exist before federal courts will exercise jurisdiction. We turn first to whether Schutz meets these requirements as to each statute.

1. The Fee Statute

We agree with the district court that Schutz has standing to challenge the Fee Statute. First, the higher fee he paid as a nonresident for an elk license in 2002 and a big horn sheep license in 2003 is an actual, concrete injury that the courts could remedy. *See Vermont Agency of Natural Res. v. United States ex rel. Stevens, 529 U.S. 765, 772-73, 146 L. Ed. 2d 836, 120 S. Ct. 1858 (2000).* [**10] Second, the increased cost for nonresidents over residents is an injury caused by the statute. Finally, a change to the statute, eliminating the gap between resident and nonresident fees, would redress this grievance. Thus, Schutz's Fee Statute challenge meets the three basic constitutional standing requirements.

2. The Quota Statute

Second, we also agree with the district court that Schutz has standing to challenge the Quota Statute. The district court based this decision on the "equal-footing" doctrine set forth in *Northeastern Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville, 508 U.S. 656, 666-67, 124 L. Ed. 2d 586, 113 S. Ct. 2297 (1993).* In that case, the Court held that the inability of eligible bidders to compete for a governmental benefit--contract set asides for racial minorities--is an injury in fact, even when the petitioning party cannot demonstrate that they "would have obtained the benefit but for the barrier." *Id. at 666.* "The 'injury in fact' in an equal protection case of this variety is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit." *Id.* [**11] *; see also Gratz v. Bollinger, 539 U.S. 244, 261-62,*

[*1134] *156 L. Ed. 2d 257, 123 S. Ct. 2411 (2003)* (describing cases where standing found even though plaintiff not denied a benefit). We have applied the equal footing analysis in this circuit. *See Cache Valley Elec. Co. v. Utah Dep't of Transportation, 149 F.3d 1119, 1122 (10th Cir. 1998).*

Here, the quota system requires that Schutz and other out-of-state applicants compete for a limited number of hunting licenses, while a separate pool of resident applicants compete for a larger portion of the available licenses. Schutz can demonstrate standing if he can show that he applied for a hunting license and that Wyoming law made the "benefit" more difficult to obtain because of its preference system. *Id. at 1122; see also Conservation Force, Inc. v. Manning, 301 F.3d 985, 990 & n.3 (9th Cir. 2002)* (finding standing to challenge similar regulations on this basis where plaintiffs had never received a license). This he has done. Schutz is required to compete unequally for a limited supply of bighorn sheep licenses that are disproportionately reserved for Wyoming residents. He is therefore injured [**12] in fact and his injury is caused by the Statute. A favorable ruling in this case would redress his injuries by leveling the playing field for license applicants. He therefore has satisfied our standing requirements for his challenge to the Quota Statute.

3. The Guide Statute

Schutz's standing as to the Guide Statute is less clear. The district court found that Schutz had neither "set forth in his affidavit sufficient facts detailing that he has suffered a concrete or particularized imminent injury," nor "demonstrated that court action will redress these alleged injuries." *Schutz v. Wyoming, 2003 U.S. Dist. LEXIS 26518, No. 02-CV-165-D, at *11 (D. Wyo. May 28, 2003)* ("Order"). In particular, the Guide Statute would not, according to the district court, actually "force" Schutz to hire a guide to hunt bighorn sheep, since the statute left him free to hunt without a guide in non-wilderness areas. n1 *Wyo. Stat. Ann. § 23-2-*

401(a). Further, the court held that the Guide Statute allows any resident of Wyoming to serve as a resident guide merely by applying for a license, thus likely reducing the expense and difficulty of procuring a guide. Finally, the court was least persuaded [**13] by Schutz's claim that the statute interferes "with his right to *consider* selling a bighorn mount on E-bay." Order at 6. The court concluded that to make such a sale, Schutz would have to successfully attain four uncertain goals: draw a license, kill a trophy bighorn, remove the cape and horns of the animal without damage, and find a willing buyer. Until Schutz "has been denied the opportunity to hunt in a wilderness area or forced to pay for a guide, he has yet to suffer any injury," and thus does not have standing to challenge the Guide Statute. *Id.*

n1 Wyoming's hunting regulations divide the state into various "units," granting big game licenses to hunt in a particular unit. Schutz specifically sought a license to hunt in Unit Three, two-thirds of which is part of the Washakie Wilderness Area. Fully one-third of Unit Three, however, is not a designated wilderness area. Thus, as the district court pointed out, the Guide Statute does not apply to one-third of Unit Three. *See* Order at 5-6.

We agree, [**14] but for slightly different reasons. Schutz asks us to assert jurisdiction over a claim when he has yet to be injured by the challenged statute. First of all, he hunted for elk in 2002 and nothing in his affidavit suggests he was limited by operation of the Guide Statute in the 2002 hunt. He alleges he would like to hunt in wilderness areas *in the future* without a guide, but at the time he filed for summary judgment he had not yet applied for 2003 deer or elk licenses and established that [*1135] the Guide Statute in fact limited his hunting options. Standing is not conferred by "conjecture" or "speculation" about future hunts.

As to Schutz's application for a 2003 big horn sheep license, he also has not demonstrated standing. He may indeed be forced to choose between the unpalatable alternatives of hunting in non-wilderness areas, paying for a guide, or foregoing hunting in Wyoming. But he has not demonstrated in his affidavit that he actually drew a big horn sheep hunting license and was denied access to hunting in wilderness areas.

n2 Until this choice is actually put to Schutz, no cognizable injury in fact exists.

n2 We note that the district court's order, Schutz's affidavit, and the briefs all state that Schutz applied for a 2003 bighorn sheep license, though the record fails to disclose whether he in fact successfully drew a license, and if so, whether he relinquished this right or acted on it. Had such a record been developed, our decision on this point might have been different. We also note that in his complaint and amended complaint, Schutz confessed that he did not so much intend to redress an actual injury as "to test the federal constitutionality of three Wyoming statutes." App. tab 2 at 2, tab 5 at 2.

[**15]

We therefore affirm the district court's ruling that Schutz has not suffered an injury sufficiently concrete to give him standing to challenge the Guide Statute.

C. Equal Protection

We now turn to the merits of Schutz's claims. Schutz first argues that the district court erred in finding that the Fee and Quota Statutes did not violate the *Fourteenth Amendment's Equal Protection Clause*. The court below, of course, found that hunters are not a suspect class and that hunting is not a fundamental right, thus correctly concluding that the standard of review is the rational basis test. *See Baldwin v. Fish and Game Comm'n of Montana, 436 U.S. 371, 389, 56 L. Ed. 2d 354, 98 S. Ct. 1852 (1978)*. Under that

standard, "courts will uphold [a law] if it is rationally related to a legitimate end." *Tonkovich v. Kansas Bd. of Regents, 159 F.3d 504, 532 (10th Cir. 1998).*

Applying rational basis review, the district court concluded that the Fee and Quota Statutes are reasonably related to a number of legitimate ends. First, they "help to encourage residents to maintain their residency and by extension support [Wyoming] conservation programs." Order at 10. Second, given [**16] that residents tend to hunt smaller female game while nonresidents tend to hunt larger "trophy" males, the Statutes help preserve the gender balance needed to maintain herd sizes. *Id.* Finally, the preferences for residents "provide[] an economic boost because many people in Wyoming hunt outside their county of residence." *Id.* at 11. Schutz apparently concedes that these are legitimate ends and questions only whether the Statutes further them in a rational way. n3 According to Schutz, the district court erred in dismissing this claim at the summary judgment stage because, in his view, "the analysis of the reasonable relationship of the regulation to the means [*1136] is a factual question, not a legal issue." Aplt. Op. Br. at 21. Schutz is mistaken. Under rational basis review, "a legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data." *FCC v. Beach Communications, 508 U.S. 307, 315, 124 L. Ed. 2d 211, 113 S. Ct. 2096 (1993); Powers v. Harris, 379 F.3d 1208, 1225 (10th Cir. 2004)* (Tymkovich, J., concurring). Moreover, "those attacking the rationality of the legislative classification [**17] have the burden 'to negative every conceivable basis which might support it.'" *Beach Communications, 508 U.S. at 315* (quoting *Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356, 364, 35 L. Ed. 2d 351, 93 S. Ct. 1001 (1973)).* Under this standard, "statutory classifications will be set aside only if no grounds can be conceived to justify them." *Powers, 379 F.3d at 1217* (quoting *McDonald v. Bd. of Election Comm'rs, 394 U.S.*

802, 809, 22 L. Ed. 2d 739, 89 S. Ct. 1404 (1969)). Nor should courts in reviewing challenged classifications "(1) second guess the 'wisdom, fairness, or logic' of legislative choices; (2) insist on 'razor-sharp' legislative classifications; or (3) inquire into legislative motivations." *Id. at 1225* (citations omitted).

n3 The one exception is Schutz's objection to the lottery-within-a-lottery system of the Fee Statute, *Wyo. Stat. Ann. § 23-2-101(f)*, whereby nonresidents can buy their way into a more exclusive drawing for a set-aside portion of the nonresident licenses. This may suggest, as Schutz contends, that Wyoming is using the Fee Statute to increase the revenue it collects. More likely, the scheme increases the odds of nonresidents in drawing a license. In any event, for purposes of equal protection, it is not illegitimate to design a licensing scheme that provides financial incentives to increase one's odds in a license lottery. *See Powers v. Harris, 379 F.3d 1208, 1219-23, 1226* (describing economic regulation and equal protection).

[**18]

With these principles in mind, we turn to the application of the rational basis standard to the facts of this case. While we agree with Schutz that some of Wyoming's goals may seem speculative, we cannot conclude that there exists *no* reasonable justification for the in-state preferences. Many reasons exist, in fact, for states to adopt a preference scheme. Residential preferences are commonly considered a benefit of state citizenship for finite resources such as wildlife resources, higher education, or access to state run facilities. While the reasons for preferences are varied--and context specific--it is not irrational to provide them. In-state residents, for example--especially those who hunt or fish--have a vested long-term interest in the sustainability of Wyoming's wildlife management system. This includes not

just political support for such programs, but direct financial support through fees and taxes. In-state residents may be counted on more reliably to hunt in Wyoming year after year, thus supporting long-term game and fish habitat preservation, herd management programs, new species programs such as the introduction of the gray wolf or grizzly bear populations, or, finally, [**19] the more mundane aspects of wildlife programs such as adequate highways, off-road and hiking trails, fire protection, and search and rescue programs. While out-of-state hunters also contribute directly and indirectly to these programs through hunting and fishing license fees and sales taxes, their financial support does not replace that made by Wyoming residents. The in-state preference is a logical and reasonable way to reward this support and foster the long-term success of wildlife management programs.

The district court's other proffered reasons are equally plausible. The legislature could reasonably conclude that lower fees for the large population of resident hunters encourages them to apply for and hunt outside their home counties and thereby provide an "economic boost" to rural areas. While out-of-state residents also travel to Wyoming, the promotion of a reliable core of residential hunters could be seen as a rational method to encourage the year-to-year economic stability essential to small communities. Similarly, Wyoming could reasonably believe that resident hunters will more likely hunt smaller animals across a larger cross-section of the state, thereby promoting the [**20] State's interests in herd management. In-state hunters might also be more familiar with state gaming [*1137] regulations and more willing to enforce them. In addition to these objectives, we note that the in-state preferences provide an advantage for the economically-disadvantaged hunters and young hunters (through lower license fees). These reasons together support Wyoming's statutory classifications at issue here.

Finally, it is worth noting the Supreme Court has found residency regulations similar to those at issue here further a

state's interest in recouping costs associated with wildlife and habitat preservation. *See Baldwin v. Fish and Game Comm'n of Montana, 436 U.S. 371, 389-90, 56 L. Ed. 2d 354, 98 S. Ct. 1852 (1978).* In *Baldwin*, a group of plaintiffs challenged Montana's elk-hunting license scheme, a scheme which created a differential license fee structure for out-of-state hunters. In analyzing whether the scheme violated the *Equal Protection Clause*, the Supreme Court noted that in-state residents, through taxes, assisted in the production and maintenance of Montana's elk populations. In-state tax revenues provided financial support for game and wildlife programs, highway [**21] construction and maintenance, fire protection efforts, and herd preservation and hunter safety programs. *Id. at 389.* Although reaping the benefits, out-of-state hunters did not concomitantly bear any of the tax burden, and therefore Montana was justified in imposing differential license fees. *See id. at 391.*

Schutz argues that *Baldwin* does not apply since the monetary difference between resident and nonresident fees is much greater in Wyoming than it was in Montana. But that argument misses *Baldwin*'s central holding: that there is "no duty on the State to have its licensing structure parallel or identical for both residents and nonresidents, or to justify to the penny any cost differential it imposes in a purely recreational, noncommercial, nonlivelihood setting." *Id. at 391.* Thus, in practical application, *Baldwin* discourages courts from interfering with a state's decision to apportion the costs of their wildlife programs between residents and nonresidents.

Furthermore, as with Montana's resident population discussed in *Baldwin*, Wyoming residents "assist[] in the production and maintenance of big-game populations [**22] through taxes," *id. at 389*, so the real dollar difference between the costs borne by residents and nonresidents (who pay no taxes) is significantly less than Schutz purports. In any event, it is clear that the fees alone do not reflect the totality of the cost

to the State of Wyoming in managing its wildlife, making wild game reasonably accessible to hunters, and regulating the resource's safe and efficient use. Wyoming's "legislative choice was an economic means not unreasonably related to the preservation of a finite resource and a substantial regulatory interest of the State." *Id. at 390.*

In conclusion, Wyoming's Fee and Quota Statutes are rationally related to legitimate state purposes. They therefore are constitutional under the *Equal Protection Clause.*

D. Dormant *Commerce Clause*

Schutz's final claim relates to the effect Wyoming's Fee Statute has on interstate commerce. The *Commerce Clause of the U.S. Constitution* states that "Congress shall have the power . . . to regulate Commerce with foreign Nations, and among the Several States, and with the Indian tribes." U.S. Const. Art. I, § 8. The Supreme Court has read into this language [**23] a "negative" or "dormant" component that grants courts the power to invalidate state regulations that discriminate against interstate commerce. *See* [*1138] *Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 571-72, 137 L. Ed. 2d 852, 117 S. Ct. 1590 (1997).* The essential element of a successful dormant *Commerce Clause* claim is congressional inaction, so when Congress does act, the dormancy ends, thus leaving the courts obliged to follow congressional will. Such is the case here. In May, 2005 House Bill 1268 ("HB 1268"), the "Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, 2005," was signed into law by the President. Although seemingly unrelated to the general thrust of the legislation, Section 6063 of HB 1268 specifically addresses the very questions at issue in the present case. Section 6063(b)(1) provides:

It is the policy of Congress that it is in the public interest for each State to continue to regulate the taking for

any purpose of fish and wildlife within its boundaries, including by means of *laws or regulations that differentiate between residents and nonresidents of such State with respect to the availability* [**24] *of licenses* or permits for taking of particular species of fish or wildlife, the kind and numbers of fish and wildlife that may be taken, or the fees charged in connection with the issuance of licences or permits for hunting and fishing.
(emphasis added). Section 6063(b)(2) further demonstrates Congress's intent to limit claims like Schutz makes here:

> Silence on the part of Congress shall not be construed to impose any barrier under clause 3 of Section 8 or Article I of the Constitution (commonly referred to as the "*commerce clause*") to the regulation of hunting or fishing by a State or Indian tribe.

Enactment of HB 1268 renders Schutz's dormant *Commerce Clause* claim moot. Constitutional mootness exists "when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *County of Los Angeles v. Davis, 440 U.S. 625, 631, 59 L. Ed. 2d 642, 99 S. Ct. 1379 (1979)*. This court adheres to the same standard. *See Utah Animal Rights Coalition v. Salt Lake City Corp., 371 F.3d 1248, 1257 (10th Cir. 2004)*; *Citizens for Responsible Gov't State PAC v. Davidson, 236 F.3d 1174, 1178 (10th Cir. 2000)*. [**25] Thus, when Congress acted to confirm the rights of states to regulate these activities, Schutz's claim ended.

Furthermore, the case and controversy "must be extant at all stages of review, not merely at the time the complaint is filed." *Arizonans for Official English v. Arizona, 520 U.S. 43, 67, 137 L. Ed. 2d 170, 117 S. Ct. 1055 (1997)*; *see also Nova Health Sys. v. Gandy, 388 F.3d 744, 754 (10th Cir. 2004)*. So even while on appeal, the doctrine of constitutional mootness applies. Congress has unmistakably

foreclosed dormant *Commerce Clause* petitions challenging state hunting and fishing statutes that treat nonresidents differently than residents. We therefore find, and Schutz has conceded, that his claim that the Wyoming statutes are an unconstitutional infringement on interstate commerce is moot due to the enactment of HB 1268, Section 6063. n4

n4 Prior to the enactment of HB 1268, the Ninth Circuit applied Article I, § 8 to facts very similar to the present case, holding that big game hunting substantially affects interstate commerce and thus should be regulated through judicial application of the dormant *Commerce Clause. Conservation Force, Inc. v. Manning, 301 F.3d 985, 992-94 (9th Cir. 2002).*

[**26]

III. Conclusion

We hold that Schutz has not suffered an injury sufficiently concrete to create a case [*1139] or controversy relating to the Guide Statute. As for the Fee and Quota Statutes, the district court correctly ruled that they do not violate the *Equal Protection Clause of the Fourteenth Amendment.* Finally, congressional enactment of HB 1268, Section 6063 makes moot Schutz's Article I, Section 8 claim. We therefore affirm the judgment of the district court.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

DONALD J. SCHUTZ,
Plaintiff,

vs. Case No. 02-CV-165-D

THE STATE OF WYOMING, and TOM THORNE, in his official capacity as Director of the Wyoming Game and Fish Commission, *et al.*,

Defendants.

ORDER ON DEFENDANTS' MOTION TO DISMISS

The Court hereby converts Defendants' Motion to Dismiss into a Motion for Summary Judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. Additional time will be allowed for supplemental materials as follows:

Movant, State of Wyoming *et al.,* has twenty days to supplement the record;

Plaintiff has twenty days thereafter to supplement the record;

Additional briefing is limited to fifteen (15) pages.

The briefs shall be limited to the following two issues: (1) Whether the Plaintiff has standing to bring this claim in this Court, and (2) whether there is a dormant Commerce Clause violation.

DATED this 21st day of January, 2003.

Hon. William Downes
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

DONALD J. SCHUTZ

Plaintiff,

vs. No.: 02CV165-D
THE STATE OF WYOMING et al
Defendant.

MINUTE ORDER

Minute Order entered by Chief Judge William F. Downes Pursuant to Plaintiff s Motion for Continuance of Proceedings on Summary Judgment to Permit Discovery Pursuant to Rule 56(F), F.R.Civ.P. (Doc #17):
The Court hereby GRANTS Plaintiff's Motion and shall extend the deadline 20 days from the date of this Order.

DATED this 13th day of March, 2003.

Betty A. Griess, Clerk

By_____
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

DONALD J. SCHUTZ,

Plaintiff,
vs. Case No. 02-CV-165-D

THE STATE OF WYOMING, and TOM THORNE, in his official capacity as Director of the Wyoming Game and Fish Commission, *et al.*,

Defendants.

ORDER ON CROSS MOTIONS FOR SUMMARY JUDGMENT

This matter comes before the Court on Cross Motions for Summary Judgment. The Court having considered the materials submitted in support and opposition, having heard oral argument, and being otherwise fully advised, FINDS and ORDERS as follows:

BACKGROUND

The Plaintiff, Donald Schutz, brought this action against the Defendants, State of Wyoming and the Wyoming Game and Fish Commission *et. al.*, requesting that this Court declare three Wyoming statutes that regulate the hunting of big game unconstitutional. Specifically, the Plaintiff alleges the following statutes violate the United States Constitution: (1) the "Guide" statute, WYo. STAT. ANN. § 23-2-401 (Lexis 2002); (2) the "Quota" statute, WYo. STAT. ANN. § 23-1-703 (Lexis 2002); and (3) the "Fee" statute, WYo. STAT. ANN. § 23-2-101 (Lexis 2002). The State of Wyoming

brought a Motion to Dismiss under Rule 12(b)(1) and (6). The Court converted the Motion to Dismiss into a Motion for Summary Judgment and allowed
the parties to supplement the record with affidavits and additional briefing. The Court subsequently granted Schutz a continuance to allow for discovery. The State of Wyoming then re-filed with a Motion for Summary Judgment. Schutz also filed his Motions for Summary Judgment.

The Plaintiff is a Florida attorney who at one time attended Laramie High School and the University of Wyoming. He claims that while he lived in Wyoming he hunted in two federal wilderness areas, "the Savage Run Wilderness area and the Laramie Peak Wilderness area." (Amended Complaint ¶ 9; Schutz Aff. ¶ 6).[1] In 2002, Schutz investigated Wyoming's hunting regulations. After his investigation he purchased a non-resident elk license, but alleges he changed the location of his hunt because of the "guide" statute. Schutz also claims that he applied for, and if successful, will purchase a 2003 Rocky Mountain Bighorn Sheep license to hunt in unit three. (Schutz Aff. ¶ 8). He also concedes that he did not apply for a non-resident elk or deer tag for the 2003 season. *Id.* In the following paragraph of his affidavit, he states that if he receives a bighorn sheep license he will be forced to hire a professional guide at an approximate cost of $6,425.00 to $1.1,435.00. (Schutz Aff. ¶ 10; Amended Complaint ¶¶ 16-20). In addition, Schutz also claims that if he is successful in his obtaining a bighorn sheep license, and if he is successful in actually shooting one, and if it is a trophy animal, he will consider selling the "trophy mount" on E-bay. (Schutz Aff. ¶ 13, 14; Amended Complaint ¶

[1] Although the Court must consider the evidence in the light most favorable to the non-moving party it is impossible to ignore the fact that there is no "Laramie Peak Wilderness Area" in Wyoming. Until Congress determines to declare this

area a wilderness area, it will remain Forest Service, Bureau of Land Management, and private property.

_____

Hon. William Downes
United States District Judge

14(a) n.2).

STANDARD OF REVIEW

"By its very terms, [the Rule 56(c)] standard provides that the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgement; the requirement is that there is no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986) (emphasis in original).

The trial court decides which facts are material as a matter of law. "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgement . . . . [W]hile the materiality determination rests on the substantive law, it is the substantive law's identification of which facts are critical and which facts are irrelevant that governs." *Id.* at 248; *see also Carey v. United States Postal Serv.*, 812 F.2d 621, 623 (10th Cir. 1987). The relevant inquiry is "whether it is so one-sided that one party must prevail as a matter of law." *Id.* at 623. In considering the party's motion for summary judgement, the court must examine all evidence in the light most favorable to the non-moving party. *Barber v. General Elec. Co.*, 648 F.2d 1272, 1276 n.1 (10th Cir. 1981). However, "[w]hen a motion for summary judgement is made and supported as provided in [Rule 56], an adverse party may not rest upon the allegations or denials of the adverse party's pleadings, but the adverse party's response, by affidavits or otherwise provided in [Rule 56], must set forth specific facts showing that there is a genuine issue for trial." FED. R. Civ. P. 56(e).

DISCUSSION

Standing:

Defendants' Motion to Dismiss and Motion for Summary Judgment challenges the Plaintiff's standing in this Court. Standing "is perhaps the most important of the Article III

justiciability doctrines." *Clajon Production Corp. v. Petera,* 70 F.3d 1566, 1572 (10th Cir. 1995) *(citing Allen v. Wright,* 468 U.S. 737, 750, 104 S. Ct. 3315. 1124, 82 L.Ed.2d 556, (1983)). Before any other issue can be addressed, this Court must first determine whether it can entertain this suit. *Warth v. Seldin,* 422 U.S. 490, 498, 95 S. Ct. 2197, 2205 (1975). Additionally, "standing jurisprudence is a highly case-specific endeavor, turning on the precise allegations of the parties seeking relief." *Wyoming ex rel. Sullivan v. Lujan,* 969 F.2d 877, 882 (10th Cir. 1992) (quoting *National Wildlife Fed 'n v. Hodel,* 839 F.2d 694, 703-04 (D.C. Cir. 1988)).

In cases reviewing questions of standing under a motion to dismiss, the court presumes general allegations embrace those specific facts necessary to support the claim. *Committee to Save the Rio Hondo v. Lucero,* 102 F.3d 445, 449 (10th Cir. 1996); *United States v. Students Challenging Regulatory Agency Procedures,* 412 U.S. 669, 689-90 (1973); *Glover River Org. v. United States Dept. of the Interior,* 675 F.2d 251, 254 n. 3 (10th Cir.1982). With a summary judgment motion, however, the Plaintiff "can no longer rest on such `mere allegations,' but must `set forth' by affidavit or other evidence `specific facts,' which for purposes of a summary judgment motion will be taken as true." *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 561 (1992) (citations omitted). Moreover, Plaintiff has the burden "to establish jurisdiction by demonstrating that they are a proper party to invoke judicial resolution of the dispute." *United States v. Hays,* 515 U.S. 737, 743 (1995).

To establish standing for cases or controversies under Article III of the United States Constitution, the Plaintiff must demonstrate the following three factors:

First [Schutz] . . . suffered an injury in fact - an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or

hypothetical. Second, there must be a causal connection between the injury and the conduct complained o f - the injury has to be fairly traceable to the challenged action of the defendant and not the result of the independent action of some third party before the court. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Lujan, 504 U.S. at 560-61 (internal quotation marks, omission marks, brackets and citations omitted); *Buchwald v. University of New Mexico,* 159 F.3d 487, 493 (10th Cir. 1998); *State of Utah v. Babbitt,* 137 F.3d 1193, 1202 (10th Cir. 1998).

This Court finds that the Plaintiff does not have standing to invoke federal jurisdiction and challenge Wyoming's "guide" statute. Plaintiff boldly asserts that he will be forced to hire a professional guide if he chooses to buy the bighorn sheep license. (Schutz Aff. ¶ 10). Although the Court is constrained by viewing the evidence in the light most favorable to the non-moving party, it cannot ignore the fact that Plaintiff would not be forced to hire a guide when hunting bighorn sheep in unit three.
Unit three is located on the eastern boundary of Yellowstone National Park. The unit does not stretch into the Park, but runs along the east edge. A section of the Washakie Wilderness Area runs through approximately two-thirds of the unit. *(See Wyoming Game & Fish Regulations, 2003 Bighorn Sheep Application Book).* It is important to note that Plaintiff would be able to hunt without a professional guide on at least one-third of the unit. *Id.* While this may decrease Plaintiff's chances of having a successful hunt, he cannot unequivocally state that he would be prohibited from hunting in the unit without a professional guide. In fact, nothing in the "guide" statute requires the Plaintiff to pay for a guide, it

merely requires that a resident guide be utilized if hunting in a wilderness area. "No resident shall hunt big or trophy game animals on any designated wilderness area . . . unless accompanied by a licensed professional guide or *resident guide."* WYO. STAT. ANN. § 23-2-401(a) (emphasis added). The Legislature expressly provided that any resident with a valid big game license need only to apply for a resident guide license to take non-residents into wilderness areas free of charge. *Id.* at § 23-2-401(b). Until Plaintiff has been denied the opportunity to hunt in a wilderness area or forced to pay for a guide, he has yet to suffer any injury. Moreover, Plaintiff's allegation that Wyoming's "guide" statute is interfering with his right to *consider* selling a bighorn mount on E-bay is even more conjectural. *See* (Schutz Aff. ¶ 13). Plaintiff presupposes that he would actually be able to: (1) Draw a license for a big horn sheep in the future; (2) successfully kill a trophy animal without a guide in a wilderness area; (3) remove the cape and horns without damage for a taxidermist to mount; and, (4) find a willing buyer.

Even though the Court is mindful of the applicable standard for evaluating standing claims, the series of assumptions the Plaintiff requests this Court to make stretches the standing doctrine too far. Blatantly false allegations and speculative conclusions are not sufficient to meet the *Lujan* affidavit standing requirements. The Plaintiff has not set forth in his affidavit sufficient facts detailing that he has suffered a concrete or particularized imminent injury, nor has he demonstrated that court action will redress these alleged injuries. Accordingly, Plaintiff does not have standing in this Court to challenge the "guide" statute.

The Court, however, cannot reach the same conclusion with respect to the "quota" and "fee" statutes. Although Plaintiff failed to raise this issue in his briefing, the Court is mindful that the "inability to compete on ... equal footing" can rise to

the level of a concrete injury. *See N.E. Fla. Chapter, Associated Gen. Contractors of Am. v. City of Jacksonville, 508* U.S. *656, 666,* 113 S.Ct. *2297,* 124 L.Ed.2d *586 (1993).* In *City of Jacksonville,* the Court stated:

When the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group, a member of the former group seeking to challenge the barrier need not allege that he would have obtained the benefit but for the barrier in order to establish standing. The `injury in fact' in an equal protection case of this variety is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit.

Id. at 666. This standard has also been adopted in the Tenth Circuit. *See Cache Valley Electric Co. v. State of Utah Dept. of Transportation,* 149 F.3d 1119, 1122 (10th Cir. 1980).

The Plaintiff has never been denied a Wyoming non-resident elk or deer license, but he appears to have suffered an injury in that he cannot compete on "equal footing" for his bighorn license. Clearly, the Plaintiff's chances of obtaining a bighorn sheep are much less than that of a Wyoming resident. Thus, Wyoming's "quota" and "fee" statutes, under a standing analysis, can be viewed as barriers that deny the Plaintiff equal treatment. The Court also finds that the Plaintiff has demonstrated the necessary causal and redressability requirements. Therefore, the Plaintiff has standing to challenge Wyoming's bighorn sheep licensing, as it pertains to non-resident quotas and fees. *See Wyoming Outfitters Assoc. et al. v. Wyoming Game & Fish Comm 'n,* 98-CV-1027 (D. Wyo. July 5, 2000); *Conservation Force, Inc. v. Manning, 301* F.3d 985 (9th Cir. 2002).

Equal Protection:

The Equal Protection Clause of the Fourteenth Amendment provides: "No State shall ... deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. AMEND. XIV, § 1. This right was best described by the United States Supreme Court in *Harris v. McRae,* 448 U.S. 297, 322 (1980):

It is well settled that where a statutory classification does not itself impinge on a right or liberty protected by the Constitution, the validity of classification must be sustained unless `the classification rests on grounds wholly irrelevant to the achievement of [any legitimate governmental] objective.' . . . This presumption of constitutional validity, however, disappears if statutory classification is predicated on criteria that are, in a constitutional sense, `suspect,'.. . *Id.* (citations omitted). In other words, "unless a legislative classification or distinction burdens a fundamental right or targets a suspect class, courts will uphold it [state action] if it is rationally related to legitimate end." *Tonkovich v. Kansas Bd. of Regents,* 159 F.3d 504, 532 (10th Cir. 1998). The Plaintiff makes the claim that Wyoming's big game statutes violate the Equal Protection Clause of the Fourteenth Amendment. The Court disagrees.

The United States Supreme Court addressed the instant issue in *Baldwin v. Fish and Game Comm 'n of Montana,* 436 U.S. 371 (1978), where it held that hunting was not a fundamental right, and hunters are not a suspect class. *Id.* at 388-89; *see also Terk v. Ruch,* 655 F.Supp. 205, 212-13 (D.Colo. 1987). Because the Court has determined that hunting and non-resident hunters are neither a suspect class, nor involved in pursuing a fundamental right, the correct standard of review is the rational basis test. *Baldwin,* 436 U.S. at 389. Courts have determined that state action subject to rational basis review is presumptively constitutional. Therefore, the burden is on the Plaintiff to establish that the action is irrational or arbitrary and that it

cannot conceivably further a legitimate governmental interest. *Riddle v. Mondragon,* 83 F.3d 1197, 1207 (10th Cir. 1996). Put simply, under rational basis test, "statutory discrimination will not be set aside if any set of facts reasonably may be conceived to justify it." *Id.* (citing *McGowan v. Maryland,* 366 U.S. 420, 426 (1961)).

1. The Guide Statute:

Even if the Plaintiff had standing, the State of Wyoming has submitted a number of reasons why the "guide statute" is rationally related to a legitimate state interest. First, guides are required to "report to the department [Wyoming Game and Fish] or any game warden each violation of the [Wyoming Game and Fish Act] by any person guided" WYO. STAT. ANN. § 23-2-403, thereby protecting Wyoming's wildlife from poaching. Second, guides serve an important role in protecting nonresident hunters in wilderness areas where search and rescue operations can prove most difficult.[2] (Flagg Aff. If 5). Third, guides help protect this state's wildlife resource by aiding non-resident hunters in the proper identification of the species and gender being hunted. (Waggoner Aff. ¶ 8). In short, the "guide" statute protects the State of Wyoming and its people by preventing unnecessary costs and the inadvertent destruction of perhaps one of its greatest natural resources. Therefore, the Court finds that Wyoming's "guide statute" is rationally related to a legitimate state interest.

2. Fee and Quota Statute:

Wyoming's "fee and quota statutes" also are rationally related to a legitimate state interest. *See Baldwin, 436* U.S. at *392* (J. Burger concurring) ("they [elk] are natural resources of the State, and Montana citizens have a legitimate interest in preserving their access to them.")

The State of Wyoming submits that the differentials in price and quotas reflect the costs associated with processing applications from nonresidents. (Rowe Aff. ¶ *7); see also Wyoming Outfitters Assoc. et al.,* 98-CV-1027-J, at *53.*

Wyoming also contends that the regulations reflect the desire to reward residents for conservation of wildlife and the economic sacrifices in forgoing development to protect habitat. The preference helps to encourage residents to maintain their residency and by extension support

---

[2] In his response and affidavit the Plaintiff vehemently objects to this reasoning. He states that being a non-resident does not mean he is somehow less qualified to navigate wilderness areas. The Plaintiff's argument would be more persuasive had he not incorrectly designated National Forest and BLM lands as the nonexistent "Laramie Peak Wilderness Area."

people by preventing unnecessary costs and the inadvertent destruction of perhaps one of its greatest natural resources. Therefore, the Court finds that Wyoming's "guide statute" is rationally related to a legitimate state interest.

2. Fee and Quota Statute:

Wyoming's "fee and quota statutes" also are rationally related to a legitimate state interest. *See Baldwin, 436* U.S. at *392* (J. Burger concurring) ("they [elk] are natural resources of the State, and Montana citizens have a legitimate interest in preserving their access to them.")

The State of Wyoming submits that the differentials in price and quotas reflect the costs associated with processing applications from nonresidents. (Rowe Aff. ¶ *7); see also Wyoming Outfitters Assoc. et al.,* 98-CV-1027-J, at *53.* Wyoming also contends that the regulations reflect the desire to reward residents for conservation of wildlife and the economic sacrifices in forgoing development to protect habitat. The preference helps to encourage residents to maintain their residency and by extension support conservation programs. (Taylor Aff. If 10; O'Gara Aff. If 10; Emmerich Aff. ¶ 12); *see also DeMasters v. State of Montana, 656* F.Supp. 21, *25* (D.Mont) ("Montana residency generally entails substantial economic sacrifice because of the disparity in both the quality and quantity of gainful employment here compared with more populated areas. Residents generally accept this sacrifice gladly for the privilege of enjoying the amenities available in Montana - including the ability to receive a license to hunt elk, as well as a voice in determining how Montana's elk are managed and harvested."). In addition, the preference to residents helps maintain the herd sizes in that residents choose to hunt females more than non-residents which is crucial to maintaining a sound harvest of animals. (Emmerich Aff. ¶ 13-15).

Finally, the preference to residents also provides an economic boost because many people in Wyoming hunt outside of their county of residence. (O'Gara Aff. ¶ 4-7). In light of the above-mentioned facts, the Court finds that Wyoming's "quota and fee statutes" are rationally related to legitimate state interests.

The Plaintiff has failed to overcome the presumption of constitutionality, therefore, these statutes do not violate the Equal Protection Clause of the Fourteenth Amendment.

Applicability of the Dormant Commerce Clause:

The Plaintiff also asserts that Wyoming's big game statutes violate the dormant Commerce Clause. In making this argument the Plaintiff relies heavily on the unprecedented Ninth Circuit holding in *Conservation Force v. Manning,* 301 F.3d 985 (9th Cir. 2002), that found a possible dormant Commerce Clause violation with Arizona's big game statutes. [3] In *Manning,* the district court correctly concluded that the dormant Commerce Clause did not apply to Arizona's regulation of hunting licenses "because hunting is `recreation,' which is not `a form of interstate commerce,' and because parts of elk and deer do not become articles of commerce until they are `reduced to possession' by a hunter." *Id.* at 992. The Ninth Circuit, however, adopted an unprecedented position and reversed the district court by holding that Arizona's cap on nonresident hunting substantially affects and discriminates against interstate commerce. Thus, the cap was subject to the dormant Commerce Clause principles. *Id.* at 1000. In reaching

[3] As a response to pressure from resident hunters, Arizona amended Rule 12-4-114 of the Arizona Administrative Code to place a 10% cap on the number of tags that could be awarded to non-residents that desired to hunt bull elk and antlered deer. *Manning,* 301 F.3d at 989. This amendment is very similar to Wyoming's "quota statute" now in dispute.

its conclusion, the court apparently found that elk and deer antlers were articles of commerce as they existed on the animal's head, and that the sale of those antlers, plus the revenue generated from the recreational aspects of hunting, substantially affected interstate commerce. *Id.* at 995. The Plaintiff makes nearly the same argument as the petitioners in *Manning.* Because Wyoming has a similar statute to Arizona in that both states allow for the sale of inedible portions of an animal, the Court feels compelled to address the issues raised by the Ninth Circuit. *See* WYO. STAT. Arne. § 23-3-302 ("No person shall sell, barter, or dispose of for pecuniary consideration or advantage, or obtain by sale or barter any edible portion of any game animal, game bird or game fish in this state except as permitted by this act.").[4] The Plaintiff claims that because he *might consider* selling a trophy mount, Wyoming is unconstitutionally interfering with interstate commerce.[5] The Court finds not only the Plaintiffs argument, but the Ninth Circuit's reasoning unpersuasive.

Historically, the dormant Commerce Clause has denied "the states the power to unjustifiably... discriminate against or burden the interstate flow of articles of commerce." *Or. Waste Sys., Inc. v. Dep 't of Envtl. Quality,* 511 U.S. 93, 98 (1994). The Court, however, has tempered overzealous efforts to invade the states' "ability to structure relations exclusively with

---

[4] The Court finds it interesting that the State of Wyoming could probably avoid any dormant Commerce Clause challenge if it was to remove the word "edible" from the statue. *See Shepard v. Alaska Dept. of Fish and Game,* 897 P.2d 33, 42-43 (1995); *Terk v. Ruch, 665* F.Supp. 205, 215 (D.Colo. 1987).

[5] The Court wants to point out that although the Plaintiff can probably legally sell a trophy mount, if he ever kills an animal of that stature, the desire to come into this state to

harvest a trophy animal and then quickly sell the product on E-bay is not only shocking, but disgraceful.

its own citizens" by limiting its application. *Manning,* 301 F.3d at 991 (citing *Reeves, Inc. v. Stake,* 447 U.S. 429, 441 (1980); *H.P. Hood & Sons, Inc. v. DuMond,* 336 U.S. 525, 533-34 (1949) ("[t]he desire of the Forefathers to federalize regulation of foreign and interstate commerce stands in sharp contrast to their jealous preservation of [states'] power over their internal affairs")). Courts limit the intrusion on states by first determining whether the object or activity is subject to Commerce Clause jurisdiction. *Terk,* 665 F.Supp. at 215 (District of Colorado refusing to apply dormant Commerce Clause to nonresident cap because sheep and goat hunting is not commerce).

1. Articles of Interstate Commerce:

As a threshold matter, this Court finds that unharvested game is not an article of interstate commerce, thus a dormant Commerce Clause analysis is not applicable to Wyoming's statutes. This finding is in accordance with United States Supreme Court precedent. In *Toomer v. Witsell,* 334 U.S. 385, 394-95 (1948), the Court, dealing with a Commerce Clause challenge to a state tax on commercial fishing, stated that "the taxable event, the taking of shrimp, occurs before the shrimp can be said to have entered the flow of interstate commerce." In *Hughes v. Oklahoma,* 441 U.S. 322, 329 (1979), the Court held "[w]hen any animal . . . is lawfully killed for the purposes of food or other uses of man, it *becomes* an article of commerce." (emphasis added). The Court has always been clear -- an animal is not an article of commerce until it has been killed or captured. *Id.*

Other lower courts are also in accordance with this general holding. In *Shepard v. State of Alaska Dept. of Fish and Game, 897* P.2d 33, 41 (Ak.1995), the Alaska Supreme Court affirmed the trial court's holding that "unharvested game is not an article of interstate commerce ... [and] the only arguable impact on interstate commerce comes from the guide's [sic] business .... To the extent that that's an infringement on interstate commerce I find it to be *de*

minimus and not addressable." In *Terk, 655* F.Supp. at 215, the District of Colorado dismissed the plaintiff's Commerce Clause claims by holding that wild sheep and mountain goats were not articles of commerce. Finally, in *Tangier Sound Waterman 's Ass 'n v. Dougals,* 541 F.Supp. 1287, *1306* (E.D.Va. 1982), the court found that unharvested crabs were not articles of commerce by stating it was not convinced "that the Commerce Clause reaches a [Virginia] law whose effect is to prohibit a nonresident commercial crabber from catching crabs in Virginia."

Plaintiff contends these cases are distinguishable because the states mentioned above do not allow for the sale of inedible portions of an animal such as antlers or horns. The Court finds this argument unpersuasive. The Wyoming Legislature has made a crucial distinction on this point. Big or trophy game animals, while they are alive, are under state ownership, held in trust for the people of the state. However, once the animal is harvested, that animal becomes the property of the hunter. *See WYo.* STAT. ANN. *§* 23-1-103, ("For purposes of this act, all wildlife in Wyoming is the property of the state. It is the purpose of this act and the policy of the state to provide an adequate and flexible system for control, propagation, management, protection and regulation of all Wyoming wildlife, *There shall be no private ownership of live* animals classified in this act as big or trophy game animals.") (emphasis added). Because live animals are not articles of commerce as clearly indicated in Wyoming's statutes and the majority of case law, the quota and fees associated with big game licenses are not subject to a dormant Commerce

Clause challenge.

2. Substantial Effect on Interstate Commerce:

To circumvent the clear general rule that unharvested animals are not articles of interstate commerce, the *Manning* court makes a curious jump in logic by applying the "substantial effect on interstate commerce" analysis to Arizona's big game statutes. *Manning,* 301 F.3d at 993 ("To determine whether the dormant Commerce Clause is applicable, we ask not whether the activity regulated is a right fundamental to the vitality of the nation as a single entity, but whether it has a `substantial effect' on interstate commerce such that Congress could regulate the activity.") This new-found analysis is problematic for two reasons.

First, the *Manning* court circumvents the clear holding in *Baldwin v. Fish and Game Comm 'n,* even though the Commerce and Privileges and Immunities Clauses have a "mutually reinforcing relationship" stemming "from their common origin in the Fourth Article of the Articles of Confederation and their shared vision of federalism . . ." *Hicklin v. Orbek,* 437 U.S. 518, 531-32 (1978). This shared vision recognized that in order to have a strong unified nation the states could not discriminate against nonresidents to the detriment of interstate commerce. Thus, the two clauses are clearly intertwined in that they balance the need for the free flow of interstate commerce, while protecting against federal intrusion into areas of historic state control.

In *Baldwin,* the Court unequivocally stated that "[e]quality in access to Montana elk is not basic to the maintenance or well-being of the Union." *Id.* at 388. Admittedly, the Court made this pronouncement in the context of a Privileges and Immunities analysis, however, this Court can take guidance from the general principle that a "quota" statute is not fundamental to the integrity of the Union. If Montana's quota statute is constitutional, when non-residents were required to purchase licenses that were seven to twenty-five times more than the resident license, it is illogical to declare a similar

statute unconstitutional under a Commerce Clause analysis. Because these two clauses are so closely intertwined, this Court cannot ignore the clear pronouncement in *Baldwin* that quota and disparate fee statutes are not crucial to the well-being of the nation, and thus are constitutional. Therefore, the Court is unwilling to impose the "substantial effect" analysis under these circumstances when there is such clear direction from the Court.

The second reason the *Manning* decision is problematic is that the court inappropriately relied on *Camps NewFound/Owatonna, Inc. v. Town of Harrison Maine, 520* U.S. *564* (1997). In *Manning* the court stated:

[T]he Court rejected Maine's contention, similar to that pressed by Arizona and adopted by the district court here, that regulation of recreational camping is insulated from Commerce Clause scrutiny `because the campers are not `articles of commerce,' or more generally that interstate commerce is not at issue.' The Court called these assertions `unpersuasive' because the services of the camps, by encouraging interstate travel, 'clearly have a substantial effect on commerce as do state restrictions on making those services available to nonresidents.'

Manning, 301 F.3d at 993 (citations to *Camps* omitted). The *Manning* court severely misapprehends the holding in *Camps*. In *Manning* the court used the holding in *Camps* to establish the proposition that recreation such as camping and hunting is subject to a "substantial effect" analysis. However, the Court in *Camps* merely held that recreational camps that provided hotel amenities were subject to this kind of analysis.

In *Camps,* the Court encountered a Maine law that extended beneficial tax treatment to the operators of non-profit Maine camps. In its holding the Court found that these camps were similar to hotels in that they advertised and provided customary hotel services to nonresidents. The Court stated "[s]ummer camps are comparable to hotels that offer their guests goods and services that are consumed locally." *Camps, 520* U.S. at *573.* This similarity allowed the Court to analogize this situation to its holding in *Heart of Atlanta Motel, Inc. v. United States, 379* U.S. *241* (1964), where it stated that interstate commerce is substantially affected by the activities of a hotel that "solicits patronage from outside the State of Georgia through various national advertising media, including magazines of national circulation." *Id.* at 243. Regulating hotels or lodging and the services those entities provide is a far cry from regulating quotas for big game hunting. Quite simply, the *Manning* court's and the Plaintiffs reliance on *Camps* is misplaced. Wyoming, like Arizona, is not regulating a significant economic activity. Rather, they are merely controlling how and when big game animals can be hunted. Bringing these statutes under the umbrella of Commerce Clause jurisdiction would run counter to the long standing precedent of viewing these cases under the articles of commerce analysis. Moreover, extending the "substantial effect" analysis ignores the Court's recent curtailment of the Commerce Clause in *United States v. Morrison, 529* U.S. *598 (2000)* and *United States v. Lopez, 514 U.S. 549* (1995). Therefore, this Court finds that the decision in *Manning* and Plaintiffs argument to apply the "substantial effect" analysis to big game quota statutes is inconsistent with United States Supreme Court precedent. Accordingly, the dormant Commerce Clause is not applicable to Wyoming's big game statutes.[6]

CONCLUSION

THEREFORE, it is hereby

ORDERED that Plaintiff's Motions for Summary Judgment are DENIED. It is further ORDERED that Defendant's Motion for Summary Judgment is GRANTED.

DATED this 28th day of May, 2003.

William F. Downes

United States District Judge

6 Because the dormant Commerce Clause is inapplicable, this Court does not need to reach the issue of what standard it would apply. *See Pike v. Bruce Church, Inc., 397* U.S. 137,

142 (1970) (utilizing the "clearly excessive in relation to the putative local benefits" standard); *but see Sporhase v. Nebraska,* 458 U.S. 941, 957-58 (1982) (imposing strict scrutiny).



(d) Repealed By Laws 1997, ch. 24, § 2.

(e) The commission shall reserve eighty percent (80%) of the moose and seventy-five percent (75%) of the bighorn sheep, mountain goat and grizzly bear licenses to be issued in any one (1) year for resident hunters.

(f) Notwithstanding W.S. 23-1-704 and 23-2-101(j), any person who is issued and purchases a big or trophy game animal license for any species specified under subsections (b) and (c) of this section and is unable to use for good cause as provided by regulations that license for the year in which issued, may reserve a license for the particular species designated on the unused license for use during the immediately succeeding calendar year by applying to the commission before the opening date of the season for the designated species during the year for which the initial license is issued. The initial big or trophy game animal license shall accompany the application. Upon receipt, the commission shall cancel the initial license and prior to the season opening date for the designated species during the immediately succeeding calendar year, issue at no cost to the applicant a license for the designated big or trophy game animal valid for that year.

(g) In addition to the authority granted under subsection (b) of this section, the commission may through rule and regulation develop and implement a preference point program for nonresident antelope, nonresident deer and nonresident elk licenses which are limited in quota and would otherwise be issued through a random drawing. A program established pursuant to this subsection may be implemented for all or selected hunt areas and may be applied to all or portions of licenses for any particular species. The commission may charge nonresident license applicants a nonrefundable fee to

accumulate preference points under the program as provided in W.S. 23-2-101(m).

(h) Rules and regulations shall be promulgated by the game and fish commission to carry out subsections (a) through (f) of this section and may be promulgated as provided in subsection (g) of this section.

Wyoming Statute 23-2-101. Fees; restrictions; nonresident application fee; nonresident licenses; verification of residency required.

(a) Any qualified person may purchase a hunting license from the department or its authorized selling agents except as otherwise provided. Purchase of a license entitles the licensee to take any animal, bird or fish provided on the license within Wyoming at the time, in a place, in a manner and in an amount as provided by law and the orders of the commission. At the time of application for a resident license under this section, the applicant shall provide a valid Wyoming driver's license or a copy thereof, or other proof of residency. The commission shall promulgate reasonable rules and regulations stating what proof of residency is required so that only bona fide Wyoming residents, as defined in W.S. 23-1-102(a)(ix), receive resident licenses. For purposes of purchasing a lifetime resident license under subsection (j) of this section, an applicant shall have been a resident as defined in W.S. 23-1-102(a)(ix) continuously for a ten (10) year period immediately preceding the application date.

(b) Repealed by Laws 1999, ch. 92, § 2.

(c) The resident's or nonresident's license must bear the signature of the landowner, lessee, or agent of the owner on whose private property he is hunting or the legitimate proof as evidence that permission to hunt has been granted.

(d) The commission may issue big or trophy game licenses in areas in which all licenses initially authorized were not purchased or in which additional harvest is desired, allowing a licensee to take a big or trophy game animal of such sex or age as designated by the commission. Additional elk licenses under this subsection shall be restricted to allowing any one (1) hunter to take a maximum of two (2) elk in a season under all licenses held. The fee for the license may be reduced by the commission to the level necessary to achieve the desired management objectives, but in no case shall a resident or nonresident license fee be less than the landowner's coupon fee.

(e) Resident and nonresident license applicants shall pay an application fee in an amount specified by this subsection upon submission of an application for purchase of any limited quota drawing for big or trophy game license or wild bison license. The resident application fee shall be four dollars ($4.00) and the nonresident application fee shall be twelve dollars ($12.00). The application fee is in addition to the fees prescribed by subsections (f) and (j) of this section and by W.S. 23-2-107 and shall be payable to the department either directly or through an authorized selling agent of the department. At the beginning of each month, the commission shall set aside all of the fees collected during calendar year 1980 and not to exceed twenty-five percent (25%) of the fees collected thereafter pursuant to this subsection to establish and maintain a working balance of five hundred thousand dollars ($500,000.00), to compensate owners or lessees of property damaged by game animals and game birds.

(f) Forty percent (40%) of available nonresident elk licenses, forty percent (40%) of available nonresident deer licenses and forty percent (40%) of available nonresident antelope licenses for any one (1) calendar year shall as established by the commission, be offered to nonresident applicants upon receipt of the fee prescribed by this subsection. Seventy-five (75) of the nonresident deer licenses set aside pursuant to this subsection shall be used for a national bow hunt for deer. The licenses authorized by this subsection shall be offered by drawing to nonresident applicants prior to the drawing for the remaining nonresident licenses issued. The licenses offered under this subsection shall be issued in a manner prescribed by rules and regulations promulgated by the commission. Nothing in this subsection shall prohibit any unsuccessful applicant for a nonresident license pursuant to this subsection from submitting an application for any licenses remaining after the drawing during the calendar year in which the application under this subsection was submitted. The following fees shall be collected by the department and are in addition to the nonresident license fee for the appropriate big game species imposed under subsection (j) of this section and the application fee imposed under subsection (e) of this section:

(i) Nonresident elk license.....$400.00 in addition to the license fee imposed under paragraph (j)(xix) of this section;

(ii) Nonresident deer license....$200.00 in addition to the license fee imposed under paragraph (j)(xv) of this section;

(iii) Nonresident antelope license.....$200.00 in addition to the license fee imposed under paragraph (j)(xxxi) of this section.

(g) In promulgating rules and regulations for the taking of bighorn sheep and moose, the commission shall not

discriminate between residents and nonresidents regarding the maturity, horn size or sex of the animals which may be taken. Nothing in this subsection shall be construed as prohibiting the commission from issuing a different number of licenses for residents and nonresidents or from requiring a preference point fee from nonresidents only pursuant to subsection (m) of this section.

(h) In addition to other fees under this section, persons applying for a license or tag under this section may pay one dollar ($1.00) to fund search and rescue activities in the state. The department shall provide information on the license or tag application form that the applicant may pay the fee under this subsection. Any fees collected under this subsection shall be deposited in the search and rescue account created by W.S. 19-13-301.

(j) Subject to W.S. 23-2-101(f) and the applicable fee under W.S. 23-1-701, the following hunting licenses and tags may be purchased for the fee indicated and subject to the limitations provided:

(i) Resident black bear license; one (1) black bear
$36.00

(ii) Nonresident black bear license; one (1) black bear
300.00

(iii) Resident mountain lion license; one (1) mountain lion
24.00

(iv) Nonresident mountain lion license; one (1) mountain lion 300.00

(v) Resident daily game bird/small game license; all game birds except wild turkey 6.00

(vi) Nonresident daily game bird/small game license; all game birds except wild turkey 15.00

(vii) Resident lifetime game bird and small game license; all game birds except wild turkey 250.00

(viii) Resident lifetime game bird/small game and fishing license; all game birds except wild turkey 400.00

(ix) Resident game bird/small game license; all game birds except wild turkey 18.00

(x) Nonresident game bird/small game license; all game birds except wild turkey 60.00

(xi) Nonresident youth game bird/small game license; all game birds except wild turkey 40.00

(xii) Resident archery license 12.00

(xiii) Nonresident archery license 24.00

(xiv) Resident deer license; one (1) deer 30.00

(xv) Nonresident deer license; one (1) deer 260.00

(xvi) Resident youth deer license; one (1) deer 15.00

(xvii) Nonresident youth deer license; one (1) deer 110.00

(xviii) Resident elk license; one (1) elk 42.00

(xix) Nonresident elk license; one (1) elk, fishing privileges 480.00

(xx) Resident youth elk license; one (1) elk 25.00

(xxi) Nonresident youth elk license; one (1) elk, fishing privileges 275.00

(xxii) Resident bighorn sheep license; one (1) bighorn sheep 95.00

(xxiii) Nonresident bighorn sheep license; one (1) bighorn sheep 1,900.00

(xxiv) Resident mountain goat license; one (1) mountain goat 100.00

(xxv) Nonresident mountain goat license; one (1) mountain goat 1,800.00

(xxvi) Resident moose license; one (1) moose 90.00

(xxvii) Nonresident moose license; one (1) moose 1,200.00

(xxviii) Resident grizzly bear license; one (1) grizzly bear 500.00

(xxix) Nonresident grizzly bear license; one (1) grizzly bear 5,000.00

(xxx) Resident antelope license; one (1) antelope 26.00

(xxxi) Nonresident antelope license; one (1) antelope 225.00

(xxxii) Resident youth antelope license; one (1) antelope 15.00

(xxxiii) Nonresident youth antelope license; one (1) antelope 110.00

(xxxiv) Resident license to capture falcons for falconry purposes 30.00

(xxxv) Nonresident license to capture falcons for falconry purposes 200.00

(xxxvi) Repealed by Laws 2003, Ch. 144, § 2.

(xxxvii) License to hunt with falcon; game birds, small game animals 12.00

(xxxviii) Resident turkey license 12.00

(xxxix) Nonresident turkey license 60.00

(xl) Wyoming interstate game tag 5.00

(xli) Resident game bird license; all game birds except turkey 12.00

(xlii) Resident small game license 12.00

(xliii) From and after the date gray wolves are removed from the list of experimental nonessential population, endangered species or threatened species in Wyoming as provided by W.S. 23-1-108:

(A) Resident gray wolf license $15.00

(B) Nonresident gray wolf license $150.00

(k) Any resident qualified to purchase a moose or big horn sheep hunting license under subsection (b) of this section may pay a fee of seven dollars ($7.00) in lieu of applying for a moose or big horn sheep hunting license. Payment of the fee for a particular species under this subsection shall authorize the person to accumulate points under W.S. 23-1-703(b) for that year in the same manner as if he had unsuccessfully applied for a hunting license for that species. Payment of the fee shall be made in compliance with application dates.

(m) Subject to the provisions of this subsection, as part of any preference point program for nonresident antelope, nonresident bighorn sheep, nonresident moose, nonresident deer or nonresident elk, the commission may establish a nonrefundable fee to be retained from the license fee submitted, and may also establish a fee to be paid in lieu of applying for licenses that are limited in quota. Retention of the established fee or payment of the fee in lieu of applying shall authorize the person to accumulate a preference point for future drawings for licenses that are limited in quota for the applicable species in accordance with rules of the commission. The rules may provide for the loss of all accumulated points for persons failing to apply or to pay the in lieu fee in two (2) consecutive calendar years. The fee for any program under this subsection for antelope, deer or elk shall be established by rule and shall not exceed fifty dollars ($50.00) per species. Payment of the fee shall be made in compliance with application dates. Nothing in this subsection authorizes the commission to establish or retain a fee for resident moose or resident bighorn sheep license preference points in addition to the fee established by

subsection (k) of this section or to establish rules for bighorn sheep or moose preference point drawings in conflict with the provisions of W.S. 23-1-703(b). For nonresident bighorn sheep and nonresident moose licenses, the commission may establish by rule a nonrefundable preference point fee to be retained from the license fee submitted and may establish a fee in lieu of making application in an amount greater than that established under subsection (k) of this section, but neither fee shall exceed one hundred dollars ($100.00). Fees established under this subsection may be set at lower amounts for youth license applicants.

(n) In addition to other fees under this section, persons applying for a license or tag under this section may pay any whole dollar amount to fund the purchase of access easements by the commission to provide access to public and private lands.

(o) For issuing each harvest information permit required under federal law license selling agents and commission employees shall charge the fee authorized by W.S. 23-1-701(b)(iii).

Donald J. Schutz
535 Central Avenue
St. Petersburg, Florida 33701
727-823-3222